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May 4, 2004

Henry Walker  
(615) 252-2363  
Fax (615) 252-6363  
Email hwalker@boultcummings.com

Hon Deborah Taylor Tate, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

Re *Petition of Cinergy Communications Company for Arbitration of an  
Interconnection Agreement with BellSouth Telecommunications, Inc.  
Pursuant to the Telecommunications Act of 1996*  
Docket No. 01-00987

Dear Chairman Tate:

The above-captioned arbitration has been on hold since September, 2002. At that time, the parties anticipated that the industry would initiate a generic proceeding before the Authority to address the issue of whether BellSouth should be required to provision DSL over a UNE-P voice line. In a letter to the Authority dated September 9, 2002,<sup>1</sup> the parties agreed that this arbitration should be suspended pending the outcome of that generic proceeding.

For a number of reasons, that generic proceeding has not been initiated. Cinergy Communications, therefore, now requests that the Authority re-commence this arbitration. To begin that process, Cinergy files the attached Motion for Summary Judgment on the DSL over UNE-P issue.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

Henry Walker

HW/pp  
Enc

<sup>1</sup> Letter attached



BOULT • CUMMINGS  
CONNERS • BERRY PLC

Henry Walker  
(615) 252-2363  
Fax (615) 252-6363  
Email hwalker@boultcummings.com

September 9, 2002 5:03 PM

Gary Hotvedt, Esq.  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

Re: *Petition for Interconnection by Cinergy Communications Company  
Against BellSouth Telecommunications, Inc.*  
Docket No. 01-00987

Dear Gary:


I am writing to you as Hearing Officer in the above-captioned arbitration proceeding.

As you know, the testimony has been filed in this case and it is ready to be heard. One of the issues raised in the arbitration concerns whether or not BellSouth will provide DSL service over a UNE-P loop. This same issue was recently raised in TRA Docket 97-00309 (BellSouth's 271 application). The settlement agreement reached by the parties in Docket 97-00309 did not resolve that issue but anticipated that the TRA would address the issue in a generic proceeding and that such a proceeding would be given "expedited treatment."

In light of this agreement, Cinergy and BellSouth have agreed that the issue of DSL over UNE-P should be addressed in a generic proceeding in which both parties will participate, rather than the arbitration. The parties further agree that the arbitration hearing should be postponed until after the generic proceeding.

Very truly yours,

By:

  
Henry Walker  
Boult, Cummings, Conners & Berry, PLC  
414 Union St., Suite 1600  
Nashville, TN 37219

*Counsel for Cinergy Communications, Inc.*

c: Guy Hicks

817022 v1  
102489-003  
9/9/2002

LAW OFFICES  
414 UNION STREET, SUITE 1600 • PO BOX 198062 • NASHVILLE • TN • 37219  
TELEPHONE 615 244 2582 FACSIMILE 615 252 6380 www.boultcummings.com

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**May 4, 2004**

IN RE: PETITION OF CINERGY	)	
COMMUNICATIONS COMPANY FOR	)	
ARBITRATION OF AN	)	DOCKET NO 01-00987
INTERCONNECTION AGREEMENT	)	
WITH BELL SOUTH	)	
TELECOMMUNICATIONS, INC.	)	
PURSUANT TO THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

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**MOTION FOR SUMMARY JUDGMENT**

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Cinergy Communications Company ("Cinergy") moves for summary judgment as to issue 12 in the above-captioned arbitration proceeding with BellSouth Telecommunications, Inc. ("BellSouth").

**OVERVIEW**

Issue 12 involves BellSouth's refusal to provide DSL service (as used here, DSL is synonymous with xDSL and ADSL) over the high frequency portion of a UNE loop. As explained by Cinergy in the parties' Joint Matrix, "BellSouth refuses to provide xDSL service over the high frequency portion of a customer's line if the customer switches his voice service (the low frequency portion of the line) to a UNE-P carrier." Joint Matrix, Issue 12.

After this arbitration petition was filed, the Federal Communications Commission ("FCC") adopted new rules which now require BellSouth to permit a requesting carrier to "commingle" or "combine" an "unbundled network element or a combination of unbundled network elements" with "wholesale services obtained from an incumbent LEC." 47 C.F.R. §51.309(d)(e) and (f). As the FCC explained in paragraph 579 of the Triennial Review Order

("TRO"),<sup>1</sup> the "wholesale services" described in the new rules specifically include "switched and special access services offered pursuant to tariff." DSL is a wholesale, special access service offered by BellSouth through its Special Access FCC Tariff No. 1. Thus, the new rules give Cinergy the right to purchase DSL service from BellSouth at the tariffed rate and "combine" that service with an unbundled loop or a combination of UNEs, such as a UNE-P circuit. Since the FCC rules now provide Cinergy the relief it is seeking in Issue 12, Cinergy requests that the TRA grant Cinergy summary judgment on this issue.<sup>2</sup>

### **FACTUAL BACKGROUND**

In the company's pre-filed testimony, BellSouth has acknowledged that it refuses to provide DSL service over the same line that a CLEC is using to offer voice service through UNE-P.<sup>3</sup> In his rebuttal testimony, BellSouth witness Thomas G. Williams stated why BellSouth will only provision DSL over a BellSouth voice line.

BellSouth's ADSL offering was designed and established based on the assumption that it would be provisioned on a BellSouth voice line. BellSouth may use the High Frequency Portion of the Loop ("HFPL") when it provides the voice service ...When BellSouth is not providing the voice service (i.e. when Cinergy is providing the voice service over UNE-P), BellSouth has no right to access the

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<sup>1</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("Triennial Review Order" or "TRO")

<sup>2</sup> The agency has previously ruled on a related issue in docket 03-00119, the ITC^DeltaCom arbitration proceeding. In that docket, ITC^DeltaCom sought to require BellSouth to provide its retail, internet access service to customers who subscribed to ITC^DeltaCom's UNE-P voice service. BellSouth's retail product is an unregulated information service. Cinergy, on the other hand, seeks access to BellSouth's wholesale DSL transport, a federally regulated access service. The new FCC rules relied upon by Cinergy apply to BellSouth's DSL service (and other wholesale telecommunications services) but not to BellSouth's retail internet access service.

<sup>3</sup> Rebuttal Testimony of Cynthia K. Cox, pp. 6-7 (July 9, 2002)

HFPL or to allow anyone other than the owner of the loop such access.<sup>4</sup>

BellSouth's position is a matter of policy, not the result of any technical issues. In fact, BellSouth has, on some occasions, unintentionally provided DSL over a UNE-P voice line. As BellSouth acknowledged in response to a data request from Cinergy, BellSouth provided such service to Cinergy customers in Tennessee "as a result of a systems edit error in the spring of 2001."<sup>5</sup>

After this case was filed, the FCC's Triennial Review Order promulgated new rules which allow competing local exchange carriers to commingle unbundled network elements with the incumbent's wholesale facilities or services. FCC Rule 47 C.F.R. §51.309(e) directs incumbent carriers, such as BellSouth, to allow competing carriers to "commingle an unbundled network element or combination of unbundled network elements with wholesale services obtained from an incumbent LEC." Subsection (f) requires BellSouth to "perform the functions necessary to commingle ...a combination of network elements with one or more wholesale facilities or services that a requesting telecommunications carriers has obtained at wholesale" from the incumbent. As ordered by the FCC in the TRO, BellSouth has now amended its interstate tariffs to "permit commingling of interstate access services with UNEs and UNE combinations." TRO, at paragraph 583, footnote l804.

### **THE TRIENNIAL REVIEW ORDER**

The TRO explains, at paragraphs 579-584, why incumbent carriers are now required to allow competitors to commingle UNEs or UNE combinations with wholesale access services. According to the FCC, "We therefore modify our rules to affirmatively permit requesting carriers

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<sup>4</sup> Rebuttal Testimony of Thomas G. Williams, p 2 (July 9, 2002)

<sup>5</sup> BellSouth Responses to Cinergy's Data Requests, Item No 8 (May 22, 2002)

to commingle UNEs and combinations of UNEs with services (e.g. switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request ” TRO, paragraph 579. The agency found that restrictions on commingling (which means to “connect, combine, or otherwise attach,” Id.), puts competitive LECs “at a competitive disadvantage” by, among other things, forcing them to operate “two functionally equivalent networks—one network dedicated to local service and one dedicated to long distance and other services.” Id., at paragraph 581.

For example, BellSouth’s refusal to provide DSL service over a UNE-P voice line forces Cnergy to order “two functionally equivalent” circuits from BellSouth, a UNE-P line and a resold line, in order to provide a customer with both UNE-P voice service and BellSouth’s DSL service. See pre-filed testimony of Pat Heck, at pp 6-7.

In the TRO, the FCC declared that such restrictions as imposed by BellSouth are an “unjust and reasonable practice” in violation of 47 U.S.C. § 201 and constitute an “undue and unreasonable prejudice or advantage” in violation of 47 U.S.C. § 202. Id. The agency further noted that incumbent LECs “place no such restrictions on themselves” in providing service to customers “by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer” and concluded that such practices also violate the nondiscrimination requirement in Section 251(c)(3). Id. The agency rejected arguments by incumbents that the elimination of restrictions on commingling created a new unbundled network element which required an impairment analysis. Id. at ¶ 583 Finally, the FCC ruled that restrictions which prevent the commingling of UNEs or UNE combinations with services that are required to be offered for resale pursuant to Section 251(c)(4) would constitute an “unreasonable ...condition or limitation” upon the resale of that service in violation of the Telecommunications Act. Id., at paragraph 584. BellSouth’s DSL is a telecommunications service which BellSouth is required to

offer for resale both by Section 251(c)(4) of the Act and by explicit order of the FCC. For all of these reasons, BellSouth's policy of refusing to allow Cinergy to purchase DSL and offer it to a customer over an unbundled loop is precluded by the FCC's findings.

### **LANGUAGE OF THE NEW RULES**

The rules on commingling became effective on October 2, 2003. "Commingling" is defined as in Rule 47 C.F.R. § 51.5 as:

the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services.

The remaining rules on commingling provide in relevant part:

(e) Except as provided in § 51.318<sup>[6]</sup>, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

(f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.<sup>7</sup>

As previously discussed, the plain language of the regulations requires BellSouth to permit Cinergy to combine UNE loops, or UNE combinations, with wholesale access services, such as DSL, obtained from BellSouth.

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<sup>6</sup> 47 C.F.R. § 51.318 addresses requirements relating to commingling DS1 and DS3 loops and/or transport facilities and is not relevant to issue 12

<sup>7</sup> 47 C.F.R. § 51.309

## **BELLSOUTH'S REVISED TARIFFS**

As directed by the FCC in the TRO (see footnote 1804), BellSouth has amended its Access Services Tariff to comply with the new rules on commingling. As amended, BellSouth's tariff states:

### **2.2.3 Commingling**

(A) Except as provided in Section 51.318 of the Federal Communications Commission's rules, telecommunications carriers who obtain unbundled network elements (UNEs) or combinations of UNEs pursuant to a Statement of Generally Available Terms, under Section 252 of the Act, or pursuant to an interconnection agreement with the Telephone Company, may connect, combine, or otherwise attach such UNEs or combinations of UNEs to Access services purchased under this Tariff except to the extent such agreement explicitly:

- (1) prohibits such commingling; or
- (2) requires the parties to complete the procedures set forth in the agreement regarding change of law prior to implementing such commingling.

(B) The rates, terms, and conditions of this Tariff will apply to the Access Services that are commingled.<sup>8</sup>

This language applies to all BellSouth access services purchased pursuant to the carrier's federal tariff. DSL is a tariffed, special access service which Cinergy wishes to purchase and "combine" with an unbundled loop carrying voice traffic. Based on the language in BellSouth's tariff, Cinergy is now entitled to request, and BellSouth is obligated to provide, that DSL/UNE combination.

## **CONCLUSION**

The FCC has now spoken on this issue. The TRO, the new FCC rules, and BellSouth's own tariffs require that BellSouth allow Cinergy to combine a "combination of unbundled network elements, such as UNE-P, with wholesale access services, such as DSL, and provide both voice and broadband services to a customer over one line. Issue 12 has been resolved. For

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<sup>8</sup> Copies of the tariff provisions are attached



the reasons set forth above, Cinergy respectfully requests that this Motion For Summary Judgment be granted

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By. 

Henry Walker

414 Union Street, Suite 1600

P.O. Box 198062

Nashville, Tennessee 37219

(615) 252-2363

*Attorney for Cinergy Communications Company*

## **Attachment**

BELLSOUTH TELECOMMUNICATIONS, INC.  
BY: Operations Manager - Pricing  
29657, 675 W. Peachtree St., N.E.  
Atlanta, Georgia 30375  
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1  
1ST REVISED PAGE 2-9  
CANCELS ORIGINAL PAGE 2-9  
EFFECTIVE: OCTOBER 17, 2003

## ACCESS SERVICE

### 2 - General Regulations (Cont'd)

#### 2.2 Use (Cont'd)

##### 2.2.1 Interference or impairment (Cont'd)

- (B) Except as provided for equipment or systems subject to the F.C.C. Part 68 Rules in 47 C.F.R. Section 68.108, if such characteristics or methods of operation are not in accordance with (A) preceding, the Telephone Company will, where practicable, notify the customer that temporary discontinuance of the use of a service may be required; however, where prior notice is not practicable, nothing contained herein shall be deemed to preclude the Telephone Company's right to temporarily discontinue forthwith the use of a service if such action is reasonable under the circumstances. In case of such temporary discontinuance, the customer will be promptly notified and afforded the opportunity to correct the condition which gave rise to the temporary discontinuance. During such period of temporary discontinuance, credit allowance for service interruptions as set forth in 2.4.4(A) and (B) following is not applicable.

##### 2.2.2 Unlawful Use

The service provided under this tariff shall not be used for an unlawful purpose.

##### 2.2.3 Commingling

- (A) Except as provided in Section 51.318 of the Federal Communications Commission's rules, telecommunications carriers who obtain unbundled network elements (UNEs) or combinations of UNEs pursuant to a Statement of Generally Available Terms, under Section 252 of the Act, or pursuant to an interconnection agreement with the Telephone Company, may connect, combine, or otherwise attach such UNEs or combinations of UNEs to Access services purchased under this Tariff except to the extent such agreement explicitly:
- (1) prohibits such commingling; or
  - (2) requires the parties to complete the procedures set forth in the agreement regarding change of law prior to implementing such commingling.
- (B) The rates, terms, and conditions of this Tariff will apply to the Access Services that are commingled.
- (C) UNEs or combinations of UNEs that are commingled with Access Services are not included in the shared use provisions of this Tariff.

Certain material previously appearing on this page now appears on Original Page 2-9.1.

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BELLSOUTH TELECOMMUNICATIONS, INC.  
BY: Operations Manager - Pricing  
29G57, 675 W. Peachtree St., N.E.  
Atlanta, Georgia 30375  
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1  
9TH REVISED PAGE 2-54.1  
CANCELS 8TH REVISED PAGE 2-54.1

EFFECTIVE: OCTOBER 17, 2003

## ACCESS SERVICE

### 2 - General Regulations (Cont'd)

#### 2.6 Definitions (Cont'd)

##### Collocator - BellSouth Virtual Expanded Interconnection Service

The term "Collocator-BellSouth Virtual Expanded Interconnection Service" denotes any person, corporation, or other legal entity with whom the Telephone Company has negotiated for the purpose of provisioning an interconnection arrangement in accordance with the BellSouth Virtual Expanded Interconnection tariff provisions.

##### Collocator's Facilities - BellSouth Virtual Expanded Interconnection Service

The term "Collocator's Facilities-BellSouth Virtual Expanded Interconnection service" denotes the collocator-provided/Telephone Company leased fiber optic cables and central office terminating equipment installed and maintained by the Telephone Company for the sole use of provisioning a BellSouth Virtual Expanded Interconnection service arrangement, in accordance with the BellSouth Virtual Expanded Interconnection tariff provisions.

##### Common Line

The term "Common Line" denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch. A common line-residence is a line or trunk provided under the residence regulations of the general and/or local exchange service tariffs. A common line-business is a line provided under the business regulations of the general and/or local exchange service tariffs.

##### Commingling

The term "Commingling" means the connecting, attaching, or otherwise linking of an unbundled network element (UNE), or a combination of unbundled network elements (UNEs), to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an UNE, or a combination of UNEs, with one or more such facilities or services.

(N)

(N)

(N)

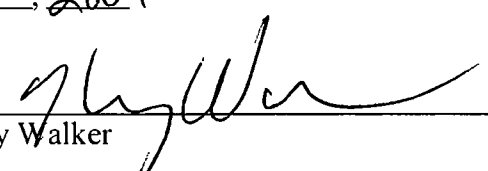
(N)

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being forwarded via U.S. Mail, to  
Guy Hicks on this the 4 day of May, 2004

  
Henry Walker